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IN THE

Supreme Court of the United States

October Term, 1969
No. 13

WILLIAM L. MAXWELL,

Petitioner,

vs.

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR AMICUS CURIAE CLINTON DUFFY.

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR AMICUS CURIAE CLINTON DUFFY.

Opinions Below.

The opinion of the United States District Court for the Eastern District of Arkansas denying petitioner's application for a writ of habeas corpus is reported at 257 F. Supp. 710. It appears in the Appendix to the Brief for Petitioner at 20-41. The opinion of the United States Court of Appeals for the Eighth Circuit affirming the District Court's denial is reported at 398 F. 2d 138, and appears in the Appendix at 43-74.

The opinion of the Supreme Court of Arkansas affirming petitioner's conviction of the crime of rape and the sentence of death is found *sub nom. Maxwell v. State*, 236 Ark. 694, 370 S.W. 2d 113 (1963). Opinions on disposition of an earlier application for habeas corpus are found *sub nom. Maxwell v. Stephens*, 229 F. Supp. 205 (E.D. Ark. 1964), *aff'd*, 348 F. 2d 325 (8th Cir. 1965), *cert. denied*, 382 U.S. 944 (1965).

Jurisdiction.

Jurisdiction was conferred on the District Court by 28 U.S.C. §2241(c)(3) (1964). Jurisdiction was conferred on the Court of Appeals by 28 U.S.C. §§1291, 2253 (1964). The jurisdiction of this Court is founded upon 28 U.S.C. §1254(1) (1964).

The judgment of the Court of Appeals was entered on July 11, 1968. (See Appendix 75.) The petition for a writ of certiorari was filed with this Court on October 9, 1968, and was granted on December 16, 1968 (see Appendix 76), limited to Questions 2 and 3 of the petition. After this matter was argued before this Court during the 1968-69 term, the case was set over to the 1969-70 term of the Court for further argument.

Questions Presented.

Certiorari was granted with respect to the following questions:

1.

Whether Arkansas' practice of allowing capital trial juries absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty upon a defendant convicted of the crime of rape, vio-

lates the Due Process Clause of the Fourteenth Amendment?

II.

Whether Arkansas' single-verdict procedure, which requires a jury to determine guilt and punishment simultaneously in a capital case, and thus requires a capital defendant to elect between the exercise of his privilege against self-incrimination and the presentation of evidence requisite to rational sentencing choice, violates the Fifth and Fourteenth Amendments?

Amicus believes that the following questions are either closely allied to the above questions or present issues which ought rightfully to be considered by the Court:

A. Whether Arkansas' practice of allowing capital trial juries absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty upon a defendant convicted of the crime of rape violates the Due Process Clause of the Fourteenth Amendment and violates the Eighth Amendment's proscription against cruel and unusual punishments, which proscription is encompassed by the Fourteenth Amendment?

B. Whether, in any circumstances short of death of the victim, a State Legislature may impose the penalty of death for the crime of rape without offending the constitutional proscription against cruel and unusual punishments?

C. Whether, in any circumstances, a State Legislature may impose the penalty of death without offending the constitutional proscription against cruel and unusual punishments?

Constitutional and Statutory Provisions Involved.

The case involves the Fourteenth Amendment to the Constitution of the United States, and the Fifth and Eighth Amendments which are incorporated within the Fourteenth Amendment.

The statutes involved are: *Arkansas Statutes Annotated* §§ 41-3403, 43-2153 (1964 Repl. vol.), which provide, respectively, as follows:

> 41-3403. *Penalty for Rape.*—Any person convicted of the crime of rape shall suffer the punishment of death [or life imprisonment].
>
> 43-2153. *Capital cases—Verdict of Life Imprisonment.*—The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor.

Interest of the Amicus Curiae.

The parties have consented to the filing of this *amicus curiae* brief; copies of their letters of consent are being submitted to the clerk with the brief.

Clinton T. Duffy is a former warden of San Quentin prison. He has personally witnessed over ~~500~~ 150 executions. Through years of first hand experience with the death penalty, its application, and its victims, he has become a confirmed opponent of capital punishment. He has authored several books on this subject, and, in 1966, he was a delegate to the third United Nations Congress on the prevention of crime and the treatment of offenders. In recognition of his expertise, he was called to testify before a subcommittee of the United States Senate, on March 20, 1968, in connection with

legislation proposed to abolish the death penalty. Excerpts from his testimony appear in an appendix to this brief.

Since retiring from San Quentin, Warden Duffy has devoted his time and energy to the abolition of the death penalty. His experience has convinced him that capital punishment is inhuman and barbaric and that it serves no useful purpose in enforcement of the law or in society.

It is the position of *Amicus* that the Arkansas practice of allowing capital trial juries absolute discretion in imposing the death penalty, without standards, not only violates the due process clause of the Fourteenth Amendment, as contended by petitioner, but also constitutes a cruel and unusual punishment forbidden by the Eighth Amendment as made applicable to the states by the Fourteenth Amendment.[1]

Amicus also contends that certain other applications of the Eighth Amendment render the death sentence in this case unconstitutional. Although these applications may not fall squarely within the precise questions upon which the petition for a writ of certiorari was granted, *Amicus* believes that they are closely allied to the certiorari questions in certain respects and in other respects present questions germane to the ultimate issue of the petitioner's fate, so that it is appropriate that the Court consider these very substantial constitutional issues.

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[1]The United States Supreme Court applied the cruel and unusual punishments clause of the Eighth Amendment to the States through the Fourteenth Amendment in *Robinson v. California*, 370 U.S. 660 (1962). See also *Johnson v. Dye*, 175 F. 2d 250, 256 (3rd Cir. 1949), *rev'd.* on other grounds, 338 U.S. 864 (1949).

Since we can add nothing meaningful to the petitioner's arguments relating to the Fifth and Fourteenth Amendment questions, we shall not plough the same field. We confine our arguments to consideration of the Eighth Amendment.

Although there have been cases containing dicta that the death penalty does not necessarily offend constitutional inhibitions against cruel and unusual punishments (*see generally Wilkerson v. Utah*, 99 U.S. 130, 134-135 (1878); *In re Kemmler*, 136 U.S. 436, 447 (1890); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947); *Trop v. Dulles*, 356 U.S. 86, 99 (1958)), this Court has never specifically held that the death penalty does not violate the proscription against cruel and unusual punishments. Moreover, this Court has never discussed the constitutionality of a sentence of death when imposed by a jury uncontrolled by standards or directions of any kind. Nor has the Court discussed whether the death sentence for a crime other than murder constitutes cruel and unusual punishment. *Amicus* respectfully submits that the time has come for the Court to face the issue squarely and to announce that, consistent with our standards of civilization, neither this petitioner nor any other person shall be put to death as a punishment for crime.

Summary of Argument.

The constitutional proscriptions against cruel and unusual punishments apply to the manner in which the punishment is selected, as well as to the degree of the punishment itself. The unregulated power of an Arkansas jury, unguided by any standards, to choose between life and death for a defendant, constitutes cruel and

unusual punishment because its very capriciousness is cruel and unusual, because it necessarily subjects the defendant to an impermissible punishment in the form of a courtroom version of Russian Roulette, and because it precludes rational inquiry into circumstances which might render the death penalty excessively cruel in a particular case.

Regardless of the procedures employed by the state, we contend that imposition of the death penalty for the crime of rape constitutes cruel and unusual punishment *per se*. The Eighth Amendment embodies within it the principle that the punishment must be in proportion to the offense; under the evolving standards of decency test, the taking of petitioner's life for a crime which did not itself involve the taking of any other life would constitute cruelly excessive punishment in violation of the constitutional prohibition.

Finally, *Amicus* will argue that death, as a punishment for any crime, is repugnant to a civilized democratic nation. Capital punishment represents a carry-over from days of retribution and vengeance which this society has now outgrown. Since the state has not shown that death sentences are a greater deterrent than life imprisonment, or that they serve any other legitimate concern of society, capital punishment has no legitimate penal purpose. Under our evolving standards of decency, the death penalty has become both inherently and unnecessarily cruel, and it is inconsistent with the mandate of the Eighth Amendment as applied to the states.

I.

The Death Penalty for the Crime of Rape, When Imposed by a Jury Which Is Uncontrolled by Standards of Any Kind in Its Choice of Punishment, Constitutes Cruel and Unusual Punishment Proscribed by the Fourteenth Amendment.

Regardless of whether it may be constitutionally impermissible to impose the death penalty for rape, or to impose the death penalty for any crime, as we contend *infra*, the procedures employed by the State of Arkansas in sentencing William Maxwell to death by electrocution render that sentence a cruel and unusual punishment.

This Court stated in *Trop v. Dulles*, 356 U.S. 86, 100 (1958):

> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."

These civilized standards impose limits upon the process of the law, as well as upon its penalties, for, as Justice Frankfurter noted, the form of the criminal process itself can be "a form of cruelty or oppression" protected against by the Eighth Amendment. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 556 (1943) (concurring opinion) (succession of trials).

The Eighth Amendment is directed against an arbitrary and capricious punishment, as well as against a punishment which is considered inherently cruel. It has been noted:

> "Closely related to proportionality are considerations of an 'equal protection' nature. If one de-

> fendant receives a punishment far more severe than those imposed upon others who have committed the same crime—evidence in itself that his punishment may be disproportionate—important questions of fairness and of a possible arbitrary use of the power to sentence are raised. Such punishment, even if within what might be considered a permissible range of penalties and though involving no torture or brutality, might well violate prevailing standards of decency."

Note, "The Cruel and Unusual Punishment Clause and the Substantive Criminal Law," 79 Harv. L. Rev. 635, 636 (1966).

Petitioner has demonstrated in his brief at pages 24-44 that the death penalty is unevenly, arbitrarily and discriminatorily applied. Unquestionably, petitioner has been sentenced to death for a crime for which most other offenders, even in Arkansas, receive far lesser penalties. Perhaps the most significant factor contributing to this phenomenon is the power of the jury, unguided by any standards and unreviewable by any court, to impose the death penalty in its unfettered discretion.

The Arkansas legislature has apparently determined that either death or life imprisonment may be the appropriate penalty for rape in any particular case. Life or death—a matter of highest significance—is apparently of insignificant difference to the Arkansas Legislature. It leaves the choice entirely to the jury. And it does so without formulating any standards to assist the jury in making such a determination; it gives the jury no guidance—not even a clue as to its purpose in requiring it to make the choice. Neither legislator nor

judge in Arkansas has suggested any factors which might be deemed exacerbating or mitigating, or even enunciated those factors which are to be deemed relevant and permissible criteria for decision-making, and those which are irrelevant and impermissible.

This legislative indifference to life or death, as evidenced by the complete lack of jury guidance, is shocking. It evidences a level of civilization far below the standards set by the Constitution. In this situation, "much more is involved here than a simple determination of sentence. For the State . . . empowers the jury in this case to answer 'yes' or 'no' to the question whether this defendant was 'fit to live.'" *Witherspoon v. Illinois*, 391 U.S. 510, 521 n. 20 (1968).

In some states the crime of rape has been divided into degrees. *See, e.g.*, 2 N.D. Century Code Annot. 12-30.04 through 12-30.09 (1960). *State v. Nagel*, 28 N.W. 2d 665, 75 N.D. 49 (1947). In some states rape may even be misdemeanor. See Ky. Rev'd Stats. §435.100 (1962). *Cannon v. Commonwealth*, 291 Ky. 500, 165 S.W. 2d 44 (1942). Hence, it is recognized that there are degrees of culpability for this crime.

But in Arkansas, rape is not divided into degrees. The charge against the defendant is the same, whether his victim is ten years old or thirty-five; whether she is seriously injured or, except for the unconsented sexual contact, she is physically unharmed; what the psychological effects were to the prosecutrix; whether the assailant endangered her life by use of a weapon, or whether he intimidated her by pure physical force; whether the defendant was a prowler or a former friend of the victim.

Given the extremely broad coverage of its statute, it is all the more disturbing that Arkansas has not deigned to prescribe some guidelines for making this most awesome of decisions. The unrestricted power of an Arkansas jury sitting in a rape case to decide, without standards or limitations, indeed without the slightest guidance, whether the defendant shall live or be killed violates the Eighth Amendment in at least three ways.

First, the defendant is subjected, not to measured punishment which represents a rational response on the part of the State to the defendant's anti-social act, but rather to the unfettered and unguided, and hence potentially irrational response of twelve men. These twelve men may decide whether the defendant shall live or die on the basis of what, to some men, would seem to be good and rational reasons; or on the contrary, they may fix the penalty on the basis of what, to the vast majority of men, would seem impermissible discrimination. Indeed, the decision-making factors may be completely irrational, such as the flip of a coin, the casting of a horoscope, or a belief in phrenology. The legislature evidently believes there are some cases in which the death penalty may be inappropriate; yet one juror may vote for a death sentence because he believes that all rape should be punished by death, while another actually believes that life imprisonment is a penalty more severe than execution. *See* the discussion of *Boone v. State*, 230 Ark. 821, 825-826, 327 S.W. 2d 87, 89-90 (1959) in petitioner's brief at 29 n.28. And, to put the matter closer to the case at bar, a juror could feel that death is the appropriate penalty where a black has committed rape on a white woman, and not in any other circumstances. So far as the Ar-

kansas legislature is concerned, the juror could rightfully believe that such a choice is permissible. So far as the Constitution of the United States is concerned, this choice cannot be permitted.

Our example is not fanciful. Indeed, petitioner has cited a number of statistics and studies which demonstrate that there is no correlation other than possibly race and poverty, to the imposition of the death penalty. See also Comment, "A Study of the California Penalty Jury in First-Degree-Murder Cases," 21 Stan. L. Rev. 1297 (1969).[9]

This Court would surely not countenance a method of marking those who must die and those who may live after a roll of the dice; nor would the Court permit the execution of every fiftieth defendant convicted of rape without regard to the facts of the particular case. Equally impermissible, would be a poll of the first twelve men in the street, selected by the clerk of the trial court, to choose whether a convicted man should live or die. And yet, is what Arkansas has done to William Maxwell markedly different?

[9] In the Federal courts, subsequent to the reinstatement of the Texas procedure in enforcing United States Attorney General Ramsey Clark stated in 1968:

> A small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned. Experienced students from many parts of the country [illegible] agree that there is no rational basis for distinguishing the few who have been executed from the many who have not. [illegible] Statement Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee on S. 1760 To Abolish the Death Penalty, July 2, 1968, Department of Justice Release, p. 2.

[illegible] Issues Twenty Unusual Years in Jury Service, 32 U. Det. L. J. 88 (1954); Mayers & Yarbrough, Bail and Jury Decisions, 54 Mich. L. Rev. 1 (1955); Comment, Women and Jury Service, 24 Wash. & Lee L. Rev. 274 (1967).

We espouse the fundamental view that when the State would impose either a punishment as severe and final as death itself or some lesser and more humane punishment, and the outcome—death or life—can turn on considerations which may be irrational and irrelevant, the defendant is subjected to cruel and unusual punishment by the very decisional process to which he is subjected. The very mark of cruel and despotic justice is that the despot need give no reason for the punishment he can decree.

Given the lack of any enunciated standards in the Arkansas statute, subjecting the rape defendant to the arbitrary power of the jury is tantamount to spinning a lottery system to determine punishment. In other words, the State of Arkansas here is seeking to exact a punishment which includes relegating the lawbreaker to the potentially capricious action of [illegible]

[illegible] submits that this irrational procedure far [illegible] comporting with the evolving standards of decency that mark the progress of a maturing society [illegible], makes a mockery of any enunciated concept of the dignity of man." *Id.* at 100.

The unfettered power of the jury results in a second type of cruel and unusual punishment in the process of the trial itself. Because the defendant cannot know what factors the jurors will apply the trial becomes a deadly game. Even under Arkansas' single verdict procedure, the defendant must choose whether to offer any mitigating circumstances. Petitioner has argued successfully that this is an unconstitutional choice. But our point here is that the single verdict procedure adds

immeasurably to the burden which defendant faces. What evidence should the defendant produce? Should he try to prove that he, personally, is unlikely to commit the same offense again? Should he try to show that others, who may not be able to control their impulses, will not be deterred by his death? Should he testify on his own behalf? Defendant is in short denied the ability to prepare an effective defense, and is instead relegated to making an irrational choice on a matter that may cost him his life.

Amicus respectfully submits that a situation which would make a game with no rules for the gamed of a man's life or life is degrading. It is itself cruel and unusual punishment which may not constitutionally be imposed.

Finally, lack of any standards must inevitably result in the occasional imposition of the death penalty in cases which do not warrant the extreme sanction. We will argue *infra* that the death penalty for any rape constitutes cruel and unusual punishment. However, regardless of whether the Court accepts the validity of that argument, we maintain that in some rape cases all fair minded people would agree that the death penalty could not be justified. Indeed, the Arkansas Legislature recognizes that death is an excessive penalty for some rapes, or it would not leave the choice to the jury.

There is yet another facet to the Arkansas system of committing the all important issue of life or death to

a jury which has no standard by which its decision is to be guided; it necessarily precludes an appellate court from passing on whether a permissible or impermissible conclusion was reached. The denial of effective judicial review is not only a deprivation of due process; it is equally a cruel and unusual punishment when the defendant is effectively deprived of the benefit of an independent review by the judiciary on the vital question of whether he must die and whether the jury acted capriciously in handing him over to the public executioner.

Justice Tobriner, joined by Chief Justice Traynor and Justice Peters, while addressing himself to Fourteenth Amendment consideration, used language equally germane to the Eighth Amendment; he said in the dissenting opinion in *In re Anderson*, 69 Cal. 2d 613, 633 (1968), 447 P. 2d 117, 154 (1968):

> Neither society nor the Legislature nor the courts have said why one capital defendant should be selected to die and another to live. The death penalty has been supported as a punishment, a deterrent, a satisfaction for revenge, an economy for the state, and on other grounds, each of which has been so little defended as it has been severely attacked. But no one knows which of these reasons and as many others as the mind can conceive are accidentally seized upon by judge or jury to grant or deny life. No one knows what causes judge or jury to select a capital defendant for death. We know only that the motives and motions that lead one death are as secret, disordered and

irrational as the statistical incidence of the death penalty itself. (Sellin, Capital Punishment (1967) 202; Kalven & Zeisel, The American Jury (1966) 436-444.) Yet the foundation rock of the law is reason; the judicial process presupposes 'that its determinations are justified only when explained or explainable in reason.' (Breitel, *The Law Makers* (1965) 65 Columb. L. Rev. 749, 772.)

"The irrational process of decreeing death cannot be reconciled with a sense of reasoned justice; we cannot explain why or when we impose the penalty. If a civilized society cannot say why one man should be executed and another not, it does not rationally, logically, take life. Instead, it grossly denies due process of law in inflicting death upon the basis of a trial that is capricious, discriminatory, and guess infested."

We cannot know whether petitioner, aged 21 at the time of his assault upon the prosecutrix without a weapon, would have been able to present enough mitigating factors to render a death sentence cruelly excessive. We do know that under Arkansas procedure, he did not have a meaningful opportunity to introduce such factors. In all events, the imposition of the death penalty, without an adequate and rational inquiry into the circumstances that would render such a penalty excessively cruel, itself offends the constitutional proscription against cruel and unusual punishment.[8]

[8] Our argument that the alternative choice of life imprisonment or death is a matter of grace and therefore not subject to constitutional attack unless the death penalty itself is unconstitutional is without merit. The states' processes, even in matters of grace, must conform to the Constitution. *See Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Jackson*, 390 U.S. 570, 582-583 (1968).

II.

Imposition of the Death Penalty for the Crime of Rape Constitutes Cruel and Unusual Punishment.

A major focus of the Eighth Amendment has been upon punishments which are cruelly excessive in relation to the crime committed. Thus, in *Weems v. United States*, 217 U.S. 349 (1910) this Court interpreted a portion of the Philippine Bill of Rights which was construed to be identical to the cruel and unusual punishments clause of the Eight Amendment to invalidate a sentence of fifteen years of "hard and painful labor," and other punishments, for the crime of falsifying an official document. The Court said there is "a precept of justice that punishment for crime shall be graduated and proportioned to offense." *Id.* at 367. Almost two decades earlier, in *O'Neil v. Vermont*, 144 U.S. 323 (1892), in which the majority failed to decide whether a prison sentence of over fifty four years for making 307 illegal sales of liquor was cruel and unusual, Mr. Justice Field had anticipated *Weems* in his dissent. He stated that "the whole inhibition [of the Eighth Amendment] is against that which is excessive." *Id.* at 340.

In *Robinson v. California*, 370 U.S. 660 (1962), the Court held that any punishment imposed upon a defendant solely for the status of being a narcotics addict was cruel and unusual. Mr. Justice Douglas, in a concurring opinion, pointed out that "a punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.'" *Id.* at 676.

Finally, in dissenting from the denial of certiorari in *Rudolph v. Alabama*, 375 U.S. 889, 889-91 (1963), Justice Goldberg asked on behalf of himself, Justice Douglas and Justice Brennan:

> "(1) In light of the trend both in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate 'evolving standards of decency that mark the progress of [our] maturing society,' or 'standards of decency more or less universally accepted'?
>
> "(2) Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against punishments which by their excessive severity are greatly disproportioned to the offenses charged?"

The present case raises the questions asked by Justice Goldberg in 1963. *Amicus* contends that under the evolving standards of decency test enunciated in *Furman* and ratified in *Gregg v. Georgia*, 428 U.S. at 173 (1976), imposition of the death penalty for the crime of rape constitutes cruelly excessive punishment.

There can be no doubt that there is a prevailing worldwide view that death as a punishment for rape violates "standards of decency more or less universally accepted." The United States is one of only four countries in the world of the reporting which permit infliction of the death penalty for the crime of rape. The others are Nationalist China, Zambia and the Republic of South Africa. See *Rudolph v. Alabama*, *supra*, 375 U.S. at 891 n.1.[9]

[9] Since 1963, Nevada and North Rhodesia have been merged to form Zambia.

The rejection of the death penalty for rape by an overwhelming majority of the community of nations is highly significant. This is the only major English-speaking country in the world (except for South Africa) in which the death penalty for rape exists. Here, only 17 states retain the penalty. *Ibid.* In 1967 there were 18,000 actual rapes in the country, 5,200 in the death penalty states; in cities having a population of 60,583,000 there were 1,013 convictions for the crime. United States Department of Justice, Federal Bureau of Investigation, Uniform Crime Reports—1967 (1968) 11, 13, 100. Yet, in the same year, only 3 states sentenced 7 men to death for rape; the last execution for rape took place in 1964. United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, No. 42, *Executions 1930-1967* (1968), 13, 22-23.

William Maxwell, who was 21 years old at the time of his offense, has been convicted of a crime which resulted from his inability to control his sexual instincts. He did not, either with premeditation or in the heat of passion, seek to take the life of another human being. He did not even carry a deadly weapon which might have endangered such a life. Yet Arkansas demands that he suffer the torture of a death sentence and ultimately be put to death for the crime of rape.

We would not be understood as minimizing the evil of rape involved where forcible rape is committed. Nor, that would we minimize other offenses violating the right of each member of society to be secure in his person. Our point is simply that the State is never justified in inflicting the disproportionate punishment of death as a penalty for rape, even if the Court rejects our other argument, *infra*, that the State is never justified in

extinguishing life as a punishment. In our constitutional scheme, the excesses of a state can no more be tolerated than the excesses of an individual.

III

Under the "Evolving Standards of Decency" Test Enunciated by This Court in Weems and Ratified in Trop, Infliction of the Death Penalty Constitutes a Cruel and Unusual Punishment.

During the congressional debates on the Bill of Rights, Mr. Livermore in questioning enactment of the Amendment is reported to have expressed his fears that

> "No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel?" Quoted in Furman v. Georgia, 33[1] U.S. 240, 261 (1972).

Early cases utilized the Eighth Amendment to preclude ancient modes of punishments such as burning at the stake, crucifixion, breaking on the wheel and similar punishments which involved "torture or a lingering death." In re Kemmler, 136 U.S. 436, 447 (1890) or which constituted "unnecessary cruelty." Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

However, in the Weems case, the Court rejected the notion that the Eighth Amendment applied only to various ancient forms of punishment. The Court in discussing the evolutionary nature of the Eighth Amendment declared:

> "Time works changes, brings into existence new conditions and purposes. Therefore a principle to

be vital must be capable of wider application than the mischief which gave it birth . . . . Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficiency and power. Its general principles would have little value and be converted by precedence into impotent and lifeless formulas. Rights declared in words might be lost in reality." 217 U.S. at 373.

Following this concept, the Court has expanded the types of punishment that are considered inherently cruel under the Eighth Amendment. *See e.g. Trop v. Dulles*, 356 U.S. 86 (1958), in which the Court held that loss of citizenship was a cruel and unusual punishment. Basing on *Weems, supra*, the Court concluded that the Eighth Amendment "must draw its meaning from evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101.

In applying the evolving standards of decency test to capital punishment, it is necessary to give some consideration to the penalty with which we are concerned. It is unfortunate that the abstraction "capital punishment" tends to obscure the reality of an execution. Unhappily, the detailed description of a legal brief of the

[illegible]

realities which attend the extinction of life by the State even by so-called "humane" methods would appear to substitute sensationalism for legal advocacy. Nevertheless, in assessing the cruelty of the death penalty, the Court must be aware of the nature of an execution; accordingly, that portion of Warden Duffy's testimony before Senator Hart's subcommittee which describes an execution has been set forth in the appendix to this brief at pages 2-5.

But the execution itself—terrible spectacle though it is—constitutes only a portion of the total punishment. The psychological and mental torture inflicted upon the prisoner awaiting death, and the preparation of the individual for the ritual extinction, comprise distinct portions of the total punishment. The mental health of the condemned men deteriorates, and the suicide rates on Death Rows are the highest in prisons. See generally Gerald H. Gottlieb, *The Capital Punishment Context* (Center for the Study of Democratic Institutions 1966) (reprinted in 9 Crime & Delinquency (No. 1), 3 (July–Aug. 1963)).

Warden Duffy has written elsewhere:

> "Death row at San Quentin is a nine-headed monster for the men there have nothing to live for but the gas chamber and little to do but think about it. In the hotbed of hopelessness and dejection, irritations become monstrous in misery, usually it produces hatred, bitterness, hopelessness and despair. There is no more depressing spot on the face of the earth than the narrow corridors of the sixth floor of the south cell block at San Quentin." Duffy, Hirshberg, 88 Men and Two Women 196-200 (1962). As Camus remarks: "The devastating degrading fear that is imposed on the condemned man for months or the year is a punish-

ment more terrible than death, and one that was not imposed on the victim." Camus, *Reflections on the Guillotine*, in Resistance, Rebellion and Death, 200 (1961).

A hallmark of our constitutional system is the principle that, to justify intringing upon human rights, the state must demonstrate a compelling interest which is sufficient to outweigh the challenged intringement and which cannot be protected by less severe means. See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Sherbert v. Verner*, 374 U.S. 398, 406-409 (1963); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *Shelton v. Randall*, 357 U.S. 513, 523-530 (1958).

This principle is applicable in testing a penalty under the cruel and unusual punishments clause of the Eighth Amendment. If the penalty does not serve any permissible aim of punishment or if there are less drastic alternatives which will serve the same purpose, then the penalty constitutes cruel and unusual punishment.

Thus in *Weems v. United States*, 217 U.S. 349, 381 (1909), the Court discussed the concept of relative cruelty based on necessity. The opinion of the Court emphasized the importance of the goals of the punishment in discussing permissible punishment under the Eighth Amendment. In rejecting the unnecessary cruelty of "hard and painful labor" as compared to less cruel punishment the Court stated:

> "The State thereby assumes nothing and loses nothing in power. The purpose of punishment is fulfilled. Crime is repressed by penalties of just severity, deterring others from crime, reformation is prevented, and hope is given for reformation of the criminal."

Similarly, in his concurring opinion in *Trop v. Dulles*, 356 U.S. 86, 111 (1958), Mr. Justice Brennan stated,

> "In view of the manifest severity of this sanction, I feel that we should look closely at its probable effect to determine whether Congress' imposition of expatriation as a penal device is justified in reason."

Mr. Justice Brennan specifically addressed himself to the question of whether there is any relationship of the punishment to the legitimate ends of penal law, *Id.* at 111, and whether the end can be achieved by "alternative methods" not open to the objections to the penalty questioned. *Id.* at 114.

And in *Robinson v. California*, 370 U.S. 660, 677 (1962), Mr. Justice Douglas stated with reference to the Cruel and Unusual Punishments clause, ". . . I think the means must stand constitutional scrutiny, as well as the ends to be achieved."

Surely, before the State may impose the ultimate sanction of extinguishing the most fundamental human right—the right to live—it must demonstrate a permissible justification and a lack of less severe alternatives. *Cf., United States v. Jackson*, 390 U.S. 570, 582-583 (1968).

The permissible aims of punishment are recognized as including deterrence, isolation and rehabilitation. *Williams v. New York*, 337 U.S. 241, 248 (1949); *Trop v. Dulles*, 356 U.S. 86, 111 (1958) (concurring opinion); *Rudolph v. Alabama*, 375 U.S. 889, 891 (1963) (dissenting opinion to denial of writ of certiorari); *Morisette v. United States*, 342 U.S. 246, 251 (1952).

This Court has noted in *Williams v. New York, supra,* at 248, that "Retribution is no longer the dominant objective of the criminal law." As the New York Court of Appeals stated, "there is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution." *People v. Oliver,* 1 N.Y. 2d 152, 160, 134 N.E. 2d 197, 202 (1956) quoted in *In re Estrada,* 63 Cal. 2d 740, 745 (1965).

In Eighth Amendment terms, penalties which have improper or solely retributive objectives run afoul of the warnings contained in virtually all of the cruel and unusual punishment cases against "unnecessary cruelty." *See e.g., Wilkerson v. Utah,* 99 U.S. 130, 136 (1878); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463 (1947).

What, then, is Arkansas' *raison d'etre* for the death penalty? Obviously it can have no rehabilitative effect. Equally obvious is the fact that isolation can be achieved through means other than death. Thus, the state can seek to justify the death penalty only in terms of deterrence.

There is, however, no credible evidence—despite exhaustive inquiries into the subject—that the death penalty is a deterrent superior to lesser punishments. *See, e.g.,* Sellin, Capital Punishment 135-186, 244-253 (1967).

"It is generally agreed between the retentionists and abolitionists, whatever their opinions about the value of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime." United Nations, Department of Economic and Social

Affairs, *Capital Punishment* (ST/SOA/SD/9-10) (1968) 123; *Accord,* Presidents' Commission on Law Enforcement and Administration of Justice, Crime in a Free Society 143 (1967).[6]

Arkansas has not met and cannot meet its burden of demonstrating the efficacy of the death penalty as a deterrent.

Indeed, it is significant that under Arkansas law the jury is given the alternative of selecting a sentence of life imprisonment or death upon finding a defendant guilty of rape. The legislature has refrained from providing any standards indicating that one penalty is preferred to the other in any given situation. Thus, the Arkansas legislature has itself determined that an alternative to the death sentence adequately serves the goal of deterrence. The choice it has left to the jury must be characterized as an impermissible choice between raw vengeance and the legitimate aims of the criminal law. As Professor Sellin has written:

> ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human

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[6]Justice Goldberg, in *Rudolph v. Alabama, supra,* at 890 n. 6, alluded to United Nations statistics showing no increase in rapes in Canada after rape ceased to be punishable by death, although he noted that such statistics must "be regarded with caution." United Nations, Capital Punishment (study prepared by Marc Ancel, Justice of the French Supreme Court, New York 1962). This international study showed an absence of any statistical correlation between deterrence and the death penalty.

conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." Sellin, The Death Penalty (1959), published as an appendix to American Law Institute, Model Penal Code, Tent. Draft. No. 9 (May 8, 1959) 15.

Unless we are to conclude that our standards of decency, rather than maturing, have taken an atavistic turn toward a more primitive form of civilization, the death penalty must be seen as a form of punishment which cannot be justified as serving any legitimate purpose of penology; even the state which imposes it considers it unnecessary to do so. The state has not and cannot demonstrate a compelling and legitimate interest in the imposition of this extreme penalty. This being so, the imposition of the death penalty constitutes "unnecessary cruelty," and is therefore unconstitutional. *Weems v. United States*, 217 U.S. 349, 370 (1910).

Amicus believes that imposition of the death penalty without a showing by the state that it, more than life imprisonment, acts as a superior mode of deterence, constitutes a palpable violation of our maturing standards of decency, which, as this Court recognized in *Williams v. New York, supra*, do not encompass vengeance or retribution. However, lest it be adduced either that our standards of decency have regressed, or that the state need not show a deterrent effect to justify the taking of a man's life, *Amicus* will argue that independent evidence repudiates any notion that the death penalty comports with this society's concept of the dignity of man. First, the *de facto* near abolition of the death penalty shows that it is no longer widely

accepted; second, the secrecy of our few executions demonstrates our shame at what we do when we do it.

In 1958 this Court, while it did not focus upon the constitutionality of the death penalty for the crime of rape, or even upon the death penalty in general, apparently believed that the death penalty was still so widely accepted as not to be considered cruel and unusual. See *Trop v. Dulles,* 356 U.S. 86, 99 (1958).

The eleven years which have passed since 1958 have witnessed a sharp acceleration in the worldwide trend toward *de facto* abolition of the death penalty, and a particularly precipitous decline in its imposition in the United States, so that the death penalty simply is no longer "widely accepted." Indeed, it has largely been repudiated, particularly for crimes other than murder. All informed observers of the death penalty agree in describing a worldwide trend toward its disuse that is nothing short of dramatic. See United Nations, *Capital Punishment*, 81-82, 96-97; Sellin, The Death Penalty, (1959) 4-14; Mattick, The Unexamined Death (1966) 5-6; Hartung, *Trends in the Use of Capital Punishment,* 284 Annals 8 (1952); Sellin, *The Inevitable End of Capital Punishment;* in Capital Punishment (1967) 239-240; Bedau, *Death Sentences in New Jersey 1907-1960,* 19 Rutgers L. Rev. 1, 9-11 (1964).

The National Crime Commission recently noted that with respect to the United States:

> "The most salient characteristic of capital punishment is that it is infrequently applied . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sen-

tence." President's Commission on Law Enforcement and Administration of Justice, Report (*The Challenge of Crime in a Free Society*) (1967) 143.

The accuracy of the Commission's report is confirmed by the Federal Bureau of Prisons. Its latest cumulative report shows that 3,859 persons were executed under civil authority in the United States between 1930 and 1967. United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, No. 42, *Executions 1930-1967* (June 1968) 1. Of these 3,859, only 191 were executed between 1960 and 1967; only 25 during the years 1964-1967. *Ibid.* The trend is shown quite adequately by setting out the figures for the number of executions during each of the following representative years:

TOTAL NUMBER OF EXECUTIONS
IN THE UNITED STATES

1930—155
1935—199
1940—124
1945—117
1950—82
1955—76
1960—56
1961—42
1962—47
1963—21
1964—15
1965—7
1966—1
1967—2

In 1968, of course, there were no executions in this country. *Id.*, at 7.

In 1968, this Court took judicial notice of the fact that a majority of Americans oppose the death penalty. *Witherspoon v. Illinois,* 391 U.S. 510, 520 (1968).

Perhaps more significant than the Gallup poll noted by the Court in *Witherspoon* was the number of eminent criminologists, penologists, and law enforcement officials who testified against the death penalty before the subcommittee of the Senate Judiciary Committee on S. 1760 *To Abolish the Death Penalty.* These included the then Attorney General of the United States Ramsey Clark, former director of Federal Prisons James V. Bennett, former Governor DiSalle of Ohio and Warren Duffy.[7]

As the President's Commission noted, we as a society are relectant to execute our criminals, and so we have drastically cut down on the number of our executions. However, we remain mortally ashamed of even our few executions. Lip service to the idea of deterrence notwithstanding, the dehumanizing influence of the spectacle of ritual execution of the condemned man has led the state to hide its cremony behind closed doors through which the public is not even admitted. The late Justice Bok of the Pennsylvania Supreme Court asked: "Why is the State so ashamed of its process that it must kill at the dead of night, in an isolated place, and on an unnamed day?" Bok, Star

[7]In September of this year, the ranks of the professionals opposed to the death penalty were augmented when the Conference of Delegates of the State Bar of California went on record as opposed to the death penalty. *Los Angeles Times,* September 9, 1969, p. 1.

Wormwood 197 (1959). The secrecy which attends the ceremony of death is an indicia that our evolving standards of decency have matured to the point where we cannot bear to see men executed. Indeed, *Amicus* would argue that the only factors which have saved the death penalty from complete extinction are the rarity and secrecy of executions. But capital punishment is not made less cruel by the fact that it is applied behind closed doors to a small and unfortunate minority. Our concept of the dignity of man tolerates in practice neither numerous nor public executions. The Court must not tolerate as a matter of law isolated and secret executions.

One further argument remains to be discussed. Despite the worldwide trend toward abolition of the death penalty, partiticularly for crimes other than murder, how can this Court decide that our evolving standards of decency are offended by the death penalty when a majority of state legislators normally thought to be the repository of public opinion have apparently reached the opposite conclusion? This would appear a frivolous argument on behalf of the State since a traditional role of this Court has been to pass upon the fundamental standards on which this society is based. *Amicus* would not mention this argument at all were it not for the existence of several State cases which have upheld the constitutionality of capital punishment on its account.

Connecticut v. Davis, ... Conn. ..... (May Term 1969), involved imposition of the death penalty for multiple murders, rather than for a rape unaccompanied by the use of a dangerous weapon, but the Connecticut court's failure to come to grips with the Eighth Amendment is illustrative of the problem. In rejecting the de-

fendant's argument that the punishment of murder with execution violated the Eighth Amendment, the state court felt impelled to observe:

> "To adopt the argument of defendant would require this court to vitiate what is inherently a legislative determination that the death penalty is an appropriate mode of punishment for the crimes enumerated [citing statutes]."

There are two answers to the Connecticut Court. First, the ineritia of some state legislatures, and their failure to alter what once may have been, but no longer is, a decent standard of inflicting punishment, does not necessarily reflect the current standards of decency of this society. Second, the Eighth Amendment places constitutional restrictions upon those who enact penalties, as well as upon those who carry them out. The Amendment is directed at both judge and legislator. Accordingly, the evolving standards of decency test is not whether the legislators of some states will suffer the continuance on their statute books of an archaic and rarely imposed penalty; rather the test must be whether our concepts of the dignity of man would allow the even-handed application of the death penalty to the thousands of men who, like William Maxwell, have been convicted of a capital offense. This test is critical to the function of the Eighth Amendment. The *amici* brief filed by the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National office for the Rights of the Indigent in *Boykin v. Alabama*, 395 U.S. 238 (1968), at page 40, presents this issue succinctly:

> "The real danger concerning cruel and inhuman laws is that they will be enacted in a form such that they can be applied sparsely and spottily to

unhappy minorities, whose numbers are so few, whose plight so invisible, and whose person so unpopular, that society can readily bear to see them suffer torments which would not for a moment be accepted as penalties of general application to the populace.

"Herein is found the difference between the judgment which the legislator makes, responding *politically* to public conscience, and the judgment which a court must make under the obligation which the Eighth Amendment imposes upon it to respond *rationally* to public conscience. A legislator may not scruple to put a law on the books whose general, even-handed, nonarbitrary application the public would abhor—precisely because both he and the public know that it will not be enforced generally, even-handedly, nonarbitrarily. But a court cannot sustain such a law under the Eighth Amendment. It cannot do so because both the Amendment itself and our most fundamental principles of due process and equal protection forbid American governments the device of arbitrariness and irregularity—even as a sop to public conscience."

This Court has traditionally been willing to hold statutes unconstitutional when they have violated the requirements of due process. *Amicus* submits that the constitutional mandate to the Court with regard to cruel and unusual punishment was framed by the Founders in even more direct and more specific terms than was the due process clause. Our evolving standards of decency do not tolerate widespread, even-handed execution of any class of convicted criminals. This Court

should not permit the State of Arkansas to single out William Maxwell from among the thousands of men who have committed capital offenses as serious as, or more serious than, the crime of rape and to impose upon him the ultimate penalty of death.

Conclusion.

For each of the reasons discussed above, the death sentence imposed upon petitioner by the State of Arkansas violates the Eighth Amendment as applied to the states by the Fourteenth Amendment. The sentence should be invalidated by this Court.

Respectfully submitted,

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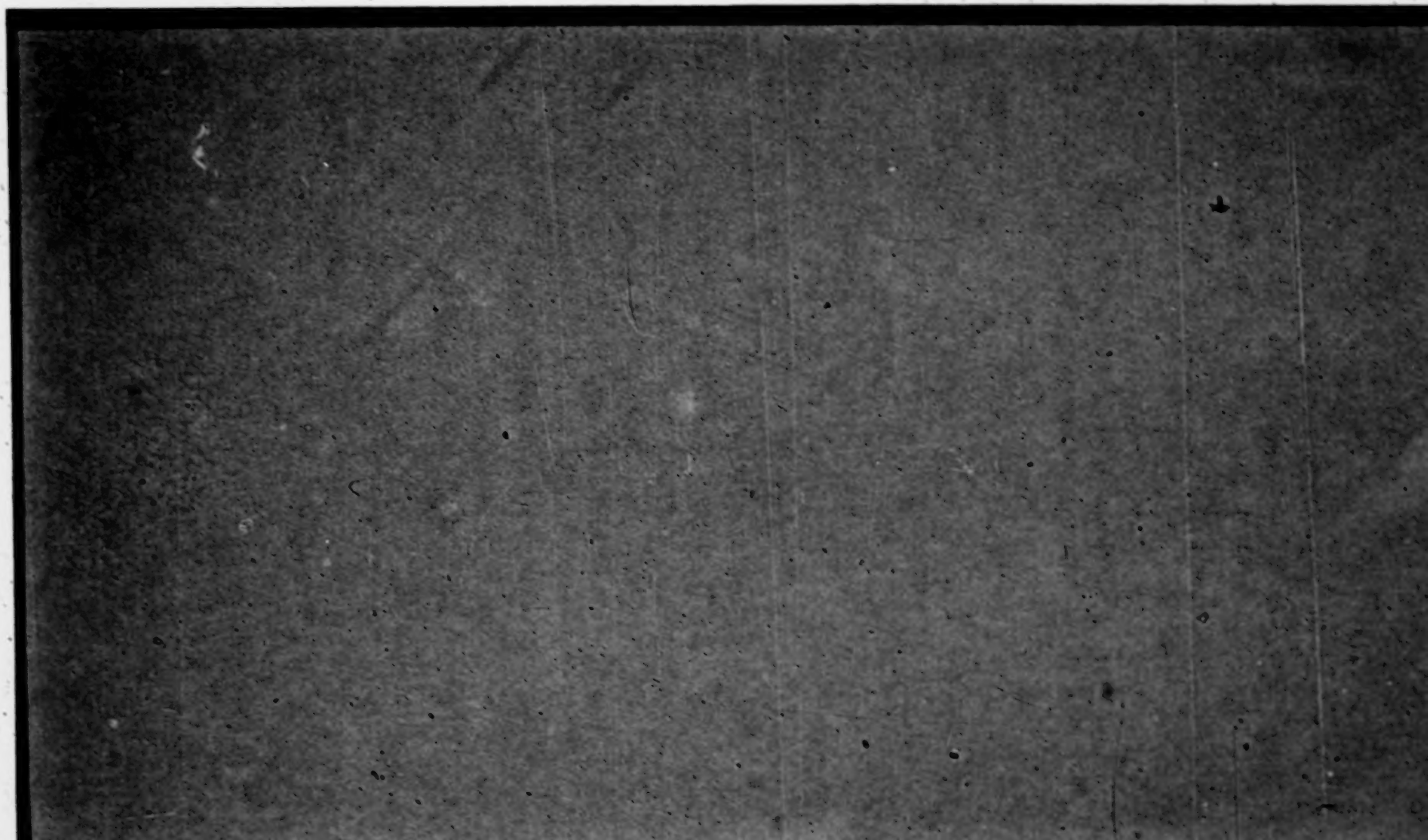

APPENDIX.

Statement of Clinton Duffy, Former Warden of San Quentin, March 20, 1968, Before the Subcommittee on Criminal Laws and Procedure of the Judiciary Committee of the United States Senate, Hearings on S. 1760, To Abolish the Death Penalty..

Mr. Duffy. Thank you very much, Senator Hart, and members of your committee.

As you said, Senator, I was born and raised in the prison town of San Quentin and I spent all but a very few of my adult years in working in prison work and my presentation therefore is going to be on my practical experiences that I have had for over 32 years in handling adult offenders, both male and female, those who have been condemned to death.

I have personally witnessed over 150 executions and have personally officiated at the execution of 88 men and two women. Prior to my appointment as Warden of San Quentin, I participated in 60 legal hangings. The two women were the first women executed in the history of the State of California.

May I preface my presentation with a brief account of methods of executions in the U.S. I would like to just say a word here about how executions became a part of the prison system in California. Prior to that time the sheriff of the county was required to perform the execution in his county, in his courtyard or in his court buildings. Some sheriffs did not like that idea, and so one of them recommended and suggested to his legislator that they change it from the county to the state prison, then only San Quentin in Cali-

fornia. This was done, passed by legislation, and San Quentin became the place for legal executions. That sheriff was against it, as you can understand.

When it became a law, the same sheriff was appointed Warden of San Quentin, and had to execute anyhow, and was still against legal executions, he, a peace officer.

Hangings were the No. 1 in our State in California, and I think they were prevalent throughout the United States. Hanging, whether the prisoner is dropped through a trap, after climbing the traditional 13 steps, or whether he is jerked from the floor after having been strapped, black-capped and noosed, is a very gruesome method of execution which has been used for many years, and is still used in several states.

When, on a nod from the Warden, the executioner signals the three men in the small enclosure on the gallows, and the officials cut taut strings one of these strings springs the trap while the other two are attached to dummy ropes. This gives the three officers a "somewhat" clear conscience, projecting the actual springing of the trap on the other person.

The day before an execution the prisoner goes through a harrowing experience of being weighed, measured for length of drop to assure breaking of the neck, the size of the neck, body measurements, et cetera. When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken, and the rope many times takes large portions of skin and flesh from

the side of the face that the noose is on. He urinates, he defecates, and droppings fall to the floor while witnesses look on, and at almost all executions one or more faint or have to be helped out of the witness room. The prisoner remains dangling from the end of the rope for from 8 to 14 minutes before the doctor, who has climbed up a small ladder and listens to his heart beat with a stethoscope, pronounces him dead. A prison guard stands at the feet of the hanged person and holds the body steady, because during the first few moments there is usually considerable struggling in an effort to breathe.

The legal witnesses are dismissed after having signed the usual witness forms. However, the body of the condemned, is left hanging below the gallows for an additional 15 or 20 minutes. This is to assure those in charge that ample time has elapsed before cutting the rope in order to make certain of death.

The body is then placed in a prison-made casket and kept in the morgue until loved ones or friends claim the remains, or in some cases they are buried in what the inmates call Boot Hill, the inmates' cemetery on the reservation. Most bodies are claimed by relatives, loved ones or friends, and funeral services are conducted in many cases in chapels in their own home town. Or a member of the clergy arranges burial in a cemetery away from the prison.

Although I have seen several electric chairs, I have never witnessed an electrocution. Wardens and other noted penologists have told me that it is about as gruesome a procedure as hanging. The body has to be prepared beforehand for the fastening, and one of the pants legs split in order that an electric plate can be placed

against the leg. When the executioner throws the switch that sends the electric current through the body, the prisoner cringes from torture, his flesh swells and his skin stretches to a point of breaking. He defecates, he urinates, his tongue swells and his eyes pop out. In some cases I have been told the eyeballs rest on the cheeks of the condemned. His flesh is burned and smells of cooked meat. When the autopsy is performed the liver is so hot that doctors have said that it cannot be touched by the human hand. As in hanging, electrocution disfigures the body severely.

Prison morale is disrupted by the dimming of the lights throughout the institution when the switch is thrown the several times necessary to insure death.

In facing a firing squad several rifle shots are fired, and all but one are effective. As in the case of hanging and electrocution, shooting disfigures the body severely.

Here again a little sidelight information. I was told by a warden recently that some years past at an execution by way of the firing squad, the sheriffs were required to bring their squad from the county of conviction to the penitentiary and perform the execution. They came, The prisoner was placed against the wall in the yard, and I imagine a target placed over his heart area, and when the sheriff gave the word to fire, they missed. They hit him in the shoulder and the prisoner went to the ground screaming in horror and in pain. They had forgot to bring additional ammunition when they were told to reload and fire again. That took about 20 minutes to go get more. They missed the second time. And so the sheriff went up and shot the prisoner in the head, walked out of the penitentiary, and resigned. This I received from a warden of one of the penitentiaries nearby that knew this to be a fact.

In administering death by lethal gas, which has been most of my experience, and hanging, from 89 personal experiences, I made the following observations:

With the exception of the death watch (which is used in all methods) there are no last hours of preparation of the body of the condemned. The prisoner is kept in a holding cell in a separate room for his last few days—usually not more than 20 feet from the lethal gas chamber. He does not see the gas chamber until he enters it. A few moments before the scheduled hour a chaplain of his choice visits with him. He is dressed in blue jeans and a white shirt. The reason for that is no other garments that might hold or pocket gas when the body is removed. He is accompanied the 10 or 12 steps by two officers, quickly strapped in the metal chair, the stethoscope applied, and the door sealed. The warden gives the executioner the signal and, out of sight of the witnesses, the executioner presses the lever that allows the cyanide gas eggs to mix with the distilled water and sulphuric acid. In a matter of seconds the prisoner is unconscious. At first there is extreme evidence of horror, pain, strangling. The eyes pop, they turn purple, they drool. It is a horrible sight. Witnesses faint. It finally is as though he has gone to sleep. The body, however, is not disfigured or mutilated in any way.

It could be said and it has been said that lethal gas executions are more humane. In all methods the person is, of course, dead. In my way of seeing it, there are no humane ways to kill people. However, in lethal gas the last preparations are not so grim. Lethal gas executions are a bit less nerve wracking on the personnel than other methods, and the family of the con-

demned prisoner, his loved ones and the friends who claim the body do not go through as much of a harrowing experience when they claim a body that has not been mutilated. I have talked with many of these folks and, although they are griefstricken, it is not quite so hard on them emotionally, when the body is not disfigured.

Throughout all of my over 32 years of prison work, as a youngster growing up in a prison town, as a young man living within a few yards of the shadows of the prison walls, I have always been against capital punishment. I have been asked many times again by people, "When did you change your mind that you changed in favor of abolition of the death penalty and why did you change your mind?"

My answer has been one word, "Never." I have always believed that this is wrong.

Senator Hart. Warden, at that point let me ask you a question which in substance is one of the arguments that is given against the abolition. You have spent a lifetime around the prison, and all of your adult life inside a prison. Wasn't your lifesaver, weren't you more secure against being jumped because the prisoners with whom you worked knew that if they killed you, in an effort to escape, or out of frustration, that they themselves would be executed? Doesn't the existence of capital punishment deter at least inmates from abusing prison personnel?

Mr. Duffy. I don't think so, Your Honor, because I will give you an example. I could give several.

I left San Quentin to go on the Parole Board, known as the Outer Authority, December 27, 1951. The fol-

lowing December 1952, in the big yard at San Quentin, there was a murder. Between here where I am seated and the door is the entrance to condemned row and the gas chamber. That man did not think of the death penalty when he murdered another prisoner. Four or five days later a second man committed a murder in this very same spot, within just a few yards of the entrance to the gas chamber. Within four weeks four men had committed murders in that same yard, with the door to the gas chamber right over there.

Now, did the first man think of the gas chamber within 20 paces from where he committed the murder? Did the second man think of what the first man might be facing, and the third what the first and second, and the fourth what the first, second and third were facing? No. They thought only of their incident, and I don't believe that the death penalty in our penitentiaries deters men from committing a crime that they have in their minds.

Senator Hart. This is a very useful answer, because you know a whole lot more about the problem than the people who have made the argument.

Mr. Duffy. Thank you. To continue. I have always been against capital punishment. Prisoners have always been a part of my life. Murderers have worked in our home. And I might say here that we believe in prison work, and know in prison work that the murderer usually is the No. 1 best prisoner, and the murderer released on parole is the No. 1 best parole risk in your communities.

As children, criminals of all types have been assigned to our gardens, repair and maintenance of build-

ings and have attended to the needs around the grade school which I attended, as grade student.

I believe one of the reasons I have been against the death penalty all of my life is very, very simple. Wrong to kill.

It is wrong that these people in our penitentiaries have murdered. That they have committed a murder is 100 percent wrong. There is no valid reason for their act.

I believe it is also wrong that the State or Federal Government commit another premeditated murder. Two wrongs do not make a right.

Deterrent:

During my years at San Quentin I talked with every man (and two women) that I had to walk to the gas chamber, that were committed to San Quentin Prison under the penalty of death. Many of these have been executed, others commuted to life imprisonment, some without possibility of parole. A few have had new trials or reversals. Some have died while serving their sentence within the prison walls. I found that 80 lifers died in prison in the 10 years surveyed, meaning that all lifers are not released, all prisoners are not released. Some are required to stay in prison the rest of their natural life and to die in prison.

I have personally asked every man (and two women) if they gave any thought to the fact that they might be executed should they commit a murder or a crime that is covered by the death penalty. I have asked hundreds—yes, thousands of prisoners, who have committed homicides, and who were not sentenced to death, whether or not they thought of the death penalty be-

fore the commission of their act. Their answer is invariably that they did not expect to get caught. That it was a crime of passion, jealousy, rage, temporary insanity.

I have interviewed and have asked the same question of thousands of robbers or men of aggression who have used a gun or other deadly weapon in the commission of their crimes. They are, of course, potential murderers. They give similar answers.

I have, to date, not had one person say that they had ever thought of the death penalty prior to the commission of their act. I have had peace officers tell me that prisoners in jail have said that the only reason that they did not use a loaded gun or they used a cap pistol was that they thought of the death penalty, and when they come to our penitentiary, however, their trials are over, everything is resolved legally, and I believe that they give you a little bit more of the regular story than they do when they are in jail trying to curry a little bit of favor, and so I have not had one of them say that they thought of the death penalty or used a toy gun or an unloaded gun. Yes, they say, "I used an unloaded gun because I didn't want to hurt someone. All I wanted was their money, and I wanted to scare them; but I didn't think of the death penalty, and that is not why I did not use it."

I do not favor capital punishment because I do not believe it is a deterrent to crime. Statistics show that where it has been abolished, there is no noticeable difference in the number of homicides committed in like areas. In some states homicides are higher in capital punishment states than in their neighboring abolition state, I believe that executions promote more similar

crimes in the community. Many of us in prison work also know that there are more homicides following an execution than preceding same.

Why do I say I believe that executions promote more similar crimes in the community? Because we have them right after executions more than prior to that, and does it create in the minds of some of the weak people that are our citizens the idea to do something similar? I use the case of Carroll Chessman, which everyone knows, knowing that in California shortly following Carroll Chessman's execution, we had one and I believe two incidents similar to his red light bandit crimes that he was convicted of and eventually executed for. So this is the point you cannot prove. But you live with it, and it seems to be that you are promoting crime by having the death penalty.

No Equality.

There is no equality in conviction and sentencing of those who commit murder. I have often said, and I repeat here, that I can take you into San Quentin Prison or to Sing Sing, Leavenworth or Atlanta prisons and I can pick out many prisoners in each institution serving life sentences or less, and can prove that their crimes were just as atrocious, and sometimes much more so, than most of those men on the row. The verdict of death by lethal execution is, I believe, an emotional release by those who are hearing the case.

May I just give another example on deterrence. We had a deputy sheriff that used to bring prisoners to us at San Quentin regularly. I talked with him. I had lunch with him. We talked of many things. He booked in prisoners in the Los Angeles County for stealing

automobiles, bad checks, all the way up to sex offenses, murder, and those sentenced to death, and brought them to San Quentin on assignment by the sheriff.

He killed his wife. He came to condemned row. I asked him, "Al, how come you didn't think of the death penalty, you are a deputy sheriff? You should have known." And we went through quite a little talk about it. He said, "Look. I planned the murder of my wife. I did it wrong. It should not have been that way. I should have handled it in some other manner, but my only thought was to plan the murder of my wife and carry it out. I did not think of the death penalty for one second. I should have."

There is a man, a peace officer, who brought men to San Quentin, who brought condemned prisoners to the institution, did not think of it.

We had another man who helped install a lethal gas chamber at San Quentin, when it was changed from hanging to lethal gas. He was in on a lesser crime. He was assigned as a laborer to help the engineer and the people who brought the lethal gas chamber from the State of Colorado, where it was manufactured, for installation.

Every night when he would come into the big yard, he would be surrounded by prisoners and they would say to him, "Tell us about the lethal gas chamber. Tell us about the "horror chamber," as they called it. And he would give them a blow-by-blow description of the installation. Invariably he would say every night, "Fellows, this is as close as I want to get to the gas chamber." And so he went out eventually, served four or five years, and he was out maybe four or five years. He

became enamored with a half sister. People tried to break it up. He killed three people, two members of his family and another.

He came back on condemned row, I asked him the same questions and his answer was almost similar to the Deputy Sheriff. "When the devil gets into you, you think of nothing else but what you are going to do. I did not think of the gas chamber, although I helped install it."

And so it is not as far as I see it a deterrent. There are many, many other cases.

As far as equality is concerned, any prison warden will tell you, any peace officer will tell you that there is not an equal performance of the outcome of the cases that come before the courts and are sentenced to prison.

Governor DiSalle said something about the wealthy are never executed. I can give you a lifetime of experience that that is true. I have asked many hundreds and hundreds of people in public addresses that I have made, "Do you know of anyone that was wealthy that was ever sentenced to be executed in the history of the United States?" And after over 35 years of lecturing, I have yet to have one say that they could. And I also preface that by saying, "If you will give the name and the location, I will research it and use it in my lectures from here on." So I call it a privilege of the poor.

Have there been errors? Yes, there have. They are reported and there is always an element of the chance of error. It is true that the automatic appeal used in some states is a means of finding any errors. However, if an innocent person is put to death, as we know and in

later years the real murderer comes to light, it is too late to do anything about it. There have been many reversals by the State and Federal courts. Many new trials ordered, lesser degrees administered and Governors and Presidents have commuted many condemned inmates to a lesser degree than death.

I believe it is somewhat emotional on the part of the people who hold the belief that the death penalty should remain. People who come to our prison are, in most cases, emotionally or mentally disturbed. I have known cases where men have had to be executed when all they were able to answer were the legal answers to questions: "Know the difference between right and wrong, the seriousness and quality of their act, and the penalty they were facing." The old McNaughton rule. They would otherwise be so mentally gone that their case was pitiful. Some would have to be led to the gallows or the gas chamber; others dragged, while screaming from mental fear.

Innocent:

Although I have never personally known of an innocent person to have been executed, there is documented proof that this has happened a few times. It is, of course, too late to do anything about it after the trap has been sprung.

Victims:

Often we are confronted with the statement: "How about the victims?" "How about their loved ones?"

Yes, we do think of the victims and of their loved ones. I have counselled with families of the victims who have come to see me about information they might be able to get from the condemned. I have directed them,

consoled them, wept with them, and prayed with them. What has happened to their loved one is wrong. I repeat two wrongs do not make a right.

We also think of the loved one of the condemned. They too suffer greatly. They have not committed any crime, but their grief is heavy.

Costs:

It costs more to execute than to send a person to prison, to serve a full life sentence, and did in prison. This is proven by a survey made by a noted penologist in the State of Illinois. (See Renewal, February 1, 1963) in which he states in part, "I found that 30 years of imprisonment," and 30 years is an insurance company acturial type of measurement, "cost the State about $45,000, assuming no cost-offsetting activity on the part of the prisoner. By way of comparison, the costs of a capital trial and appeals, special security handling in court and jail, and the long stay on condemned row, the rehearsals, and carrying out of an execution, were in excess of $60,000. Capital punishment is by no means cheaper than life imprisonment, and the jurisdiction that maintains it pays for it dearly in both money and human costs."

California's Administrator of Youth and Adult Corrections Agency in an article in Federal Probation and Parole Magazine, June 1964, wrote: "There is also the argument of cost. Why support some murderer for the rest of his life when we could execute him, and save all that money, the argument goes.

"Like so many arguments favoring the death penalty, this does not hold up under factual analysis. The actual cost of execution, the cost of operation, the

super maximum security, condemned unit, the years spent by some inmates in condemned status, and a pro rata share of top level prison officials, time spent in administering the unit add up to a cost substantially greater than the cost to retain them in prison the rest of their lives."

Edmund G. Brown, former Governor of California, stated:

"I am unalterably opposed to capital punishment. It doesn't do a single, solitary bit of good and this has been proved time after time. As a matter of fact, it increases violence because when the State is guilty of a violent act it encourages the individual to be guilty of a violent act. This is seen by violence following a war or following an execution.

"I hate to base this opinion on costs, but the cost of killing an individual is far, far greater than if we gave him life in prison. The expenses of a trial, the delay, the additional guards, the lawyers' fees, the court fees are far greater than if life imprisonment were the penalty.

"I will do anything I can to see that capital punishment is abolished."

For Others:

When people who believe in the death penalty for all premediated murders are faced with the question: "Would you want your son, your daughter, your loved one, executed if he committed a premediated murder?" The answer invariably is no. It therefore is obvious that it is good enough for someone else, but not good enough for me.

I have experienced several cases, and can quote them if need be, where people have said to me that all murderers should be executed. Then a member of their family is faced with execution, and they immediately do an about face and want their loved one saved. That has happened several times.

I believe that capital punishment in Federal and States should be abolished. Our prison systems are set up on the concept that they must protect society and must work toward the rehabilitation of the offender. I believe that most prisoners, except for mental cases, can be changed for the better. A few will have to be kept under close confinement for the rest of their natural lives. When I left the prison system there was a man who had 49 years in prison at that time, several who had well over 30 years, still serving time. Some must die in prison. Some lifers do die in prison. They have committed murder. They were not sentenced to death. Some who have been sentenced to death would fall into this catgory, others could be changed.

I personally believe that the death penalty should be abolished. We have ample facilities to keep offenders away from society for the rest of their natural lives if warranted.

When the death penalty is stricken from our statutes, and the gas chambers, the hangman's noose, the electric chair, and the firing squad are done away with as the rack, the screw, burning at the stake, drowning, throwing to the lions, and other barbaric methods were "we will all be the better for it."

May I submit, as I have been asked to do, sir, copies photographs as Exhibit 1, San Quentin, one of the

largest prises in the Unites States, another is a photograph of the gallows that was used at one time.

This is where men are kept on condemned row in California's prison and similarly in other prisons.

This is a holding cell adjacent to the lethal gas chamber where the men are held the night before, until the next morning execution.

This is the lethal gas chamber with the door open.

This is the gas chamber with the door closed when the man is in there.

And the last one is where the witnesses stand, which are the legal witnesses.

Thank you.

Senator Hart. Warden, thank you very much. I felt strongly enough about this to introduce the bill to abolish capital punishment some several years ago, but if I had had any doubts about it, your description of what happens, when you and I as the State puts somebody to death would have resolved any doubts. And yet for this record I have an obligation to ask you some questions to be sure we have a balance here.

Mr. Duffy. Yes.

"Senator Hart: You described the hideous, barbaric scene as somebody springs the trap or drops the pellet or pulls the electric switch. You described the disfigured victim, and the reaction it produced among the witnesses. But I know perfectly well that this subcommittee will be met by the person who says, "Look, there is the same disfigurement, there is the same torture, there is the same horror visited by that man on an innocent member of society. Why are you so overwhelmed by

the sight which you describe, when the reason that that sight occurs is because that same individual went out on the street or went into a bedroom and took somebody who under nobody's definition deserved it, and did to him or her the same thing that you are now bewailing as society." What do you say when somebody comes to you with that reaction, and I am sure people must have come to you.

Mr. Duffy. They have said that to me many, many times, Senator, and my answer is similar to what I have said in my statement, that what these people have done is completely wrong, 100 percent wrong. There is no rhyme or reason for it. There should have been some other way that they should have handled this. Yes, it was wrong. But is it also right for somebody else to commit another murder?

We have always of handling these people. They do not have to be murdered, a second murder. They do not have to be done any other way than we are doing today, with hundreds of homicides. Put them away. Keep them away safe from society.

No, I do not condone what these people have done for a moment. It is horrible, terrible, but should we in State and Federal also commit another horrible act?

Senator Hart. I don't know how it will impress somebody who reads the record, just the black and white. I don't know to what extent it was your presence and your voice in reading the statement to us that affected, I am sure, everyone in this room as it did me, as you described a scene that few of us have seen, and after listening to you none of us will volunteer to see. But you know, the funny thing is that if we had a public

exhibition of what you describe, if as in days of old the village was brought to the scene and everybody saw what happened to the man who today is executed at San Quentin behind the walls, in the view of very few, one of two things would result I suppose. Someone would say, "That is the way to make capital punishment serve as a deterrent." If the village saw what you described, then nobody in that village would commit an act of violence.

My reaction is that if everybody saw what you have described, we would indeed abolish capital punishment. The village would just cry "Stop."

Mr. Duffy. I believe you are right, Senator, because in my book, "88 Men and 2 Women," which is on the death penalty, and believe me this is not a plug for the book because it is out of print, you cannot buy it, I say in there that if we held legal executions in Times Square, this is before New York abolished, or in front of the Tabernacle in Utah, or on the bandstand in Golden Gate Park in San Francisco, using cross country as an example, that I believe we would soon convince the public in their minds that we should abolish the death penalty.

Senator Hart. Mr. Paisley.

Mr. Paisley. Warden, you probably have often heard the argument that there can be no assurance that the killer will stay in for a life sentence. What do you say to that argument?

Mr. Duffy. You are correct. There is no assurance that anyone will stay in prison for a life sentence unless the law says that they must stay the rest of their natural life, and that is more of an assurance than a regular life sentence.

A life sentence, as far as I have experienced it, for those who have been released, runs between 12 and 13 years, with those people being the No. 1 best parolees, above all other types of crimes in the penal code. Very rarely has it been known that a released lifer has committed another murder.

I have often had that said to me on the speaker's stand before groups. "Why do you let all these murderers out to kill again?" And I asked one simple question; "Name one." And the person who asks that question cannot name one, because they are just talking.